

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MERCEDES FALU-MAYSOMET, on  
behalf of herself and all others  
similarly situated,

Plaintiff,

vs.

NATIONAL ENTERPRISE  
SYSTEMS, INC.,

Defendant.

CASE NO. 13-cv-02285 JM (NLS)

ORDER GRANTING MOTION TO  
DISMISS

On December 3, 2013, Defendant National Enterprise Systems, Inc. (“Defendant”) filed a motion to dismiss the first amended complaint for failure to state a claim. Dkt. No. 9. After the court granted the parties’ request to continue the hearing date on this motion, Plaintiff Falu-Maysomet (“Plaintiff”) filed an opposition to Defendant’s motion, Dkt. No. 12, and Defendant subsequently filed its reply. Dkt. No. 13. For the reasons set forth below, Defendant’s motion to dismiss is granted with prejudice as to Plaintiff’s allegations in Counts I, II, and III as alleged in the amended complaint.<sup>1</sup>

**BACKGROUND**

At some point prior to August 2013, Plaintiff incurred federal student loan financial obligations from United Student Aid Fund (“USAF”). After Plaintiff

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<sup>1</sup> As set forth more fully below, Plaintiff withdraws the RFDCPA claim in Count III in her opposition to Defendant’s motion to dismiss.

1 defaulted on this debt, USAF assigned the debt to Defendant in order for Defendant  
2 to collect the debt from Plaintiff. Defendant is a corporation operating as a  
3 collection agency with its principal place of business in Solon, Ohio.

4 On August 30, 2013, Defendant sent Plaintiff a “NOTICE PRIOR TO WAGE  
5 WITHHOLDING” (“Notice”), which Plaintiff has attached to the amended  
6 complaint as Exhibit A. Plaintiff alleges that the Notice contained false and  
7 misleading statements in violation of the Fair Debt Collection Practices Act  
8 (“FDCPA”), 15 U.S.C. § 1692 *et seq.*

9 The first statement within the Notice provided as follows:

10 You are given notice that **United Student Aid Funds, Inc.**, pursuant to  
11 federal law . . . will order your employer to immediately withhold  
12 money from your earnings (a process known as Administrative Wage  
Garnishment) for payment of your defaulted student loan(s), unless you  
take action set forth in this notice.

13 Am. Compl., Ex. A at 1 (emphasis in original). The Notice further stated:

14 You must establish a written repayment agreement with National  
15 Enterprise Systems, Inc. on or before September 29, 2013. Otherwise,  
16 United Student Aid Funds, Inc. will proceed to collect this debt through  
deductions from your pay. Unless you act by September 29, 2013, your  
17 employer will be ordered to deduct from your pay an amount equal to no  
more than fifteen percent (15%) of your disposable pay for each pay  
18 period, or the amount permitted by 15 U.S.C. 1673 . . . to repay your  
student loan(s) held by United Student Aid Funds, Inc.

19 Id. Beginning on the second page of the Notice, Defendant detailed Plaintiff’s  
20 rights regarding the proposed garnishment of wages. Specifically, the letter sets  
21 forth Plaintiff’s rights under the FDCPA and the Higher Education Act (“HEA”),  
22 including her right to object to the proposed garnishment and to request a hearing  
23 on any objections. Pages 4, 5, and 6 of the Notice provide a form for Plaintiff to fill  
24 out in order to request a hearing on any objections.

25 In the amended complaint, Plaintiff alleges the Notice contained false and  
26 misleading statements that overshadowed Plaintiff’s actual rights afforded to her  
27 under the HEA and FDCPA. Although the Notice included an explanation of the  
28 rights provided by the HEA, Plaintiff contends Defendant’s initial statements on the

1 cover page of the Notice contradicted the rights described in subsequent pages.  
 2 Because the HEA provides a period of thirty days within which Plaintiff could take  
 3 steps to avoid the garnishment, Plaintiff contends Defendant's statement that  
 4 Plaintiff's employer will be ordered to "immediately" withhold Plaintiff's wages is  
 5 patently false, deceptive and misleading, and contrary to the rights afforded to her  
 6 by law. Similarly, because the HEA provides a borrower with several options to  
 7 avoid wage garnishment, only one of which is entering into a repayment agreement,  
 8 Plaintiff argues Defendant's statement that Plaintiff "must" enter into a repayment  
 9 agreement or her wages "will" be garnished is false and misleading.

10 Based upon these allegations, the amended complaint contains three claims  
 11 against Defendant: (1) Violation of 15 U.S.C. § 1692e of the FDCPA by Use of  
 12 Deception to Collect a Debt; (2) Violation of 15 U.S.C. §1692f of the FDCPA by  
 13 Using Unfair or Unconscionable Practices; and (3) Violation of the Rosenthal Fair  
 14 Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788 *et seq.* Plaintiff  
 15 asserts these claims individually and as a class action on behalf of other consumers  
 16 receiving this type of Notice from Defendant.

### 17 **LEGAL STANDARD**

18 For a plaintiff to overcome a Rule 12(b)(6) motion to dismiss for failure to  
 19 state a claim, the complaint must contain "enough facts to state a claim to relief that  
 20 is plausible on its face." Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007). "A claim  
 21 has facial plausibility when the plaintiff pleads factual content that allows the court  
 22 to draw the reasonable inference that the defendant is liable for the misconduct  
 23 alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Factual pleadings merely  
 24 consistent with a defendant's liability are insufficient to survive a motion to dismiss  
 25 because they only establish that the allegations are possible rather than plausible.  
 26 See id. at 678-79. The court should grant 12(b)(6) relief only if the complaint lacks  
 27 either a "cognizable legal theory" or facts sufficient to support a cognizable legal  
 28 theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

1 In addition, when resolving a motion to dismiss for failure to state a claim,  
 2 courts may not generally consider materials outside the pleadings. Schneider v. Cal.  
 3 Dep't of Corrs., 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998); Jacobellis v. State Farm  
 4 Fire & Cas. Co., 120 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay Television Ltd. v.  
 5 Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). “The focus of any Rule  
 6 12(b)(6) dismissal . . . is the complaint.” Schneider, 151 F.3d at 1197 n. 1. This  
 7 precludes consideration of “new” allegations that may be raised in a plaintiff's  
 8 opposition to a motion to dismiss brought pursuant to Rule 12(b)(6). Id. (citing  
 9 Harrell v. United States, 13 F.3d 232, 236 (7th Cir. 1993); 2 Moore's Fed. Prac. §  
 10 12.34[2] (Matthew Bender 3d ed.)).

11 However, “[w]hen a plaintiff has attached various exhibits to the complaint,  
 12 those exhibits may be considered in determining whether dismissal [i]s proper . . . .”  
 13 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (citing Cooper v. Bell,  
 14 628 F.2d 1208, 1210 n. 2 (9th Cir. 1980)). The court may also consider “documents  
 15 whose contents are alleged in a complaint and whose authenticity no party  
 16 questions, but which are not physically attached to the pleading. . . .” Knievel v.  
 17 ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing Branch v. Tunnell, 14 F.3d 449,  
 18 454 (9th Cir. 1994) *overruled on other grounds by* Galbraith v. County of Santa  
 19 Clara, 307 F.3d 1119 (9th Cir. 2002)).

20 When considering alleged violations of sections 1692e and 1692f of the  
 21 FDCPA, the Ninth Circuit applies the “least sophisticated debtor” standard.  
 22 Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 934 (9th Cir. 2007). “If the least  
 23 sophisticated debtor would ‘likely be misled’ by a communication from a debt  
 24 collector, the debt collector has violated the FDCPA.” Id. (quoting Swanson v.  
 25 Southern Oregon Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988)). “The  
 26 objective least sophisticated debtor standard is ‘lower than simply examining  
 27 whether particular language would deceive or mislead a reasonable debtor.’”

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1 Terran v. Kaplan, 109 F.3d 1428, 1431-32 (9th Cir. 1997)(quoting Swanson, 869  
2 F.2d at 1227)).

### 3 DISCUSSION

#### 4 **I. FDCPA Violations in Counts I and II**

5 Under the HEA, eligible lenders make guaranteed loans on favorable terms to  
6 students and parents to help finance student education costs. Rowe v. Educ. Credit  
7 Mgmt. Corp., 559 F.3d 1028, 1030 (9th Cir. 2009). These loans are typically  
8 guaranteed by guaranty agencies and are ultimately reinsured by the Department of  
9 Education (“DOE”). Id. If a borrower becomes delinquent in making his or her  
10 student loan payments, the guaranty agency has the ability to conduct an  
11 administrative wage garnishment pursuant to section 1095a of the HEA. 20 U.S.C.  
12 § 1095a(a). However, the garnishment is subject to certain restrictions, such as  
13 limiting the maximum garnishment amount to 15% of disposable wages per pay  
14 period; requiring notice to be sent to the debtor’s last known address at least 30 days  
15 prior to issuing a garnishment order to an employer; allowing the debtor the  
16 opportunity to inspect and copy documents; conducting a hearing if requested by the  
17 debtor within 15 days of the date the 30-day notice is mailed; and disallowing wage  
18 garnishment if the debtor has been involuntarily separated from employment and  
19 has not been reemployed continuously for twelve months. 20 U.S.C. § 1095a(a)-(c).

20 Plaintiff contends the Notice violated sections 1692e and 1692f of the  
21 FDCPA because it would mislead and confuse the least sophisticated consumer  
22 concerning their rights under the HEA. Under section 1692e, a debt collector may  
23 not use any “false, deceptive, or misleading representation or means in connection  
24 with the collection of any debt.” 15 U.S.C. § 1692e. Section 1692f prohibits  
25 “unfair or unconscionable means to collect or attempt to collect any debt.” 15  
26 U.S.C. § 1692f. In the amended complaint, Plaintiff specifically objects to two  
27 statements in the Notice as violating the FDCPA and raises an additional objection  
28 to the Notice in her opposition brief.

1           *A. Reference to Immediate Withholding of Wages*

2           Plaintiff's first objection pertains to the Notice's opening line: "You are given  
3 notice that **United Student Aid Funds, Inc.**, pursuant to federal law. . . , will order  
4 your employer to immediately withhold money from your earnings (a process  
5 known as Administrative Wage Garnishment) for payment of your defaulted student  
6 loan(s), unless you take action set forth in this notice." Am. Compl. Ex. A at 2  
7 (emphasis in original). Notwithstanding the explanation of her rights under the  
8 HEA on subsequent pages, Plaintiff contends Defendant's language on the cover  
9 page advising Plaintiff that the garnishment will commence immediately is patently  
10 false, deceptive and misleading, and contrary to the true rights afforded to her by  
11 law.

12           In its motion to dismiss, Defendant argues the Notice does not state that wage  
13 garnishment would be immediate; rather, the Notice stated that garnishment of  
14 wages would be immediate if Plaintiff did not "take action set forth in this notice."  
15 After advising Plaintiff she could potentially avoid wage garnishment, Defendant  
16 emphasizes that the Notice then detailed all of the rights available to her under the  
17 HEA on the second page. For this reason, Defendant contends the opening line of  
18 the Notice did not violate the FDCPA as it was neither false, deceptive, or  
19 misleading.

20           While acknowledging that the Notice contains the requisite HEA disclosures,  
21 Plaintiff contends the language used by Defendant in describing the immediate  
22 possibility of wage garnishment is misleading because it overshadows the language  
23 informing her of her HEA rights. Defendant notes that there does not appear to be  
24 any case law addressing whether statements made in conjunction with the required  
25 HEA disclosure of wage garnishment rights can nonetheless overshadow or  
26 contradict the HEA disclosure such that it violates the FDCPA, but does rely on  
27 Terran v. Kaplan, 109 F.3d 1428, 1431-32 (9th Cir. 1997), which analyzes 15  
28 U.S.C. § 1692g in another debt collection context. Much like the HEA's disclosure

1 requirements, section 1692g of the FDCPA requires debt collectors to provide  
2 consumers with adequate information concerning their dispute and validation rights,  
3 including the right to receive a notice from the debt collector stating the amount of  
4 the debt, the name of the creditor to whom the debt is owed, and the ability to  
5 dispute the validity of the debt and/or request creditor information and verification  
6 of the debt within 30 days. 15 U.S.C. § 1692g.

7 In Terran, the court considered whether the language in a collection letter  
8 overshadowed or contradicted the validation notice required by section 1692g so as  
9 to confuse a hypothetical least sophisticated debtor. 109 F.3d at 1432. The  
10 one-page letter, typed on Kaplan's law office letterhead, in a uniform size and  
11 typeface, provided as follows:

12 Please be advised that this office represents MONTGOMERY WARD  
13 CREDIT CORP with whom you have an outstanding balance of  
14 \$546.63.

15 Unless an immediate telephone call is made to J SCOTT, a collection  
16 assistant of our office at (602) 258-8433, we may find it necessary to  
17 recommend to our client that they proceed with legal action.

18 Unless you notify us in writing within thirty (30) days after receipt of  
19 our initial notice that you dispute the validity of this debt, or any  
20 portion thereof, we will assume the debt to be valid. Upon such  
21 notification, we will obtain verification of the debt or a copy of the  
22 judgment against you and a copy of such verification or judgment will  
23 be mailed to you. Upon your written request within the thirty (30) day  
24 period described above we will provide you with the name and address  
25 of the original creditor if different from the current creditor.

26 Id. at 1430.

27 In analyzing Terran, it becomes clear that both the format and substance of a  
28 payment demand are important considerations that should bridge typical consumer  
debts as well as student loan obligations.<sup>2</sup> Format considerations involve  
comparative font size, the use of bold-face type, colored type, message placement or  
arrangement and, ultimately as in Terran, whether the required validation rights are

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<sup>2</sup> One may ponder whether the hypothetical least sophisticated debtor standard should apply to the least sophisticated college student.



1 “dwarfed” by the payment demand. Id. at 1433. Substantively, it is important to  
 2 analyze whether the notice demands the debt be disputed “today,” or “immediately,”  
 3 or whether payment be made “immediately,” or whether important statutory rights  
 4 are not set forth. Id. at 1433-34.

5 In Terran, the court noted that “[t]he [questioned] validation notice  
 6 immediately follows the language regarding an immediate telephone call. The text  
 7 of the letter is uniformly presented in ordinary, same-sized font. No emphasis is  
 8 placed on any particular statement, with the exception of the creditor’s name and the  
 9 name of the person to contact at Kaplan’s office.” Id. The court also noted that the  
 10 validation notice immediately followed the language regarding an immediate phone  
 11 call to arrange payment. Id. The court concluded that the request that the debtor  
 12 “immediately” telephone a collection assistant to avoid potential legal action did not  
 13 “overshadow or contradict” the language in the notice that the alleged debtor had  
 14 thirty days in which to dispute the debt. Id. at 1434. See also Renick v. Dun &  
 15 Bradstreet Receivable Mgmt. Serv., 290 F.3d 1055, 1057-58 (9th Cir. 2002)(per  
 16 curiam)(finding a request to “[u]se the tear-off portion of this letter ... to send your  
 17 payment today” did not overshadow the language in the notice that the alleged  
 18 debtor has thirty days in which to dispute the debt because it “was in the same font  
 19 as the surrounding text; was not emphasized in any other way; was in the nature of a  
 20 request rather than a demand; and carried no sense of urgency”).

21 Rather than applying the considered approach of Terran, Plaintiff primarily  
 22 takes issue with the use of the word “must” in the Notice, as well as with the  
 23 language in the opening line of Defendant’s Notice. Applying the analysis in  
 24 Terran, the court concludes the language regarding immediate wage garnishment  
 25 does not violate sections 1692e and 1692f as it does not overshadow or contradict  
 26 the rights afforded to Plaintiff under the HEA. First and foremost, that language is  
 27 preceded by the words, in bold, “**NOTICE PRIOR TO WAGE**  
 28 **WITHHOLDING.**” This bold notice language suggests the availability of options



1 before withholding occurs. While the complained-of sentence itself contains the  
2 word “immediately,” there is no threat of immediate wage garnishment. The  
3 remainder of the Notice details the other possible actions Plaintiff may take in order  
4 to avoid wage garnishment, including exercising her rights to inspect or request  
5 records from Defendant, to object to the proposed garnishment, and to request a  
6 hearing. The available rights under the HEA are written in the same-sized font as  
7 the other parts of the Notice, much like the notices in Terran and Renick. See  
8 Terran, 109 F.3d at 1431; Renick, 290 F.3d at 1057. These rights set forth available  
9 options for Plaintiff to avoid or modify wage garnishment. Thus, much like the use  
10 of “immediately” in Terran, that term does not convey a threat which would induce  
11 the least sophisticated debtor to give up the rights afforded under the HEA. See  
12 Renick, 290 F.3d at 1057 (finding the statement on the reverse that “PROMPT  
13 PAYMENT IS REQUESTED” did not convey a threat that could induce Renick to  
14 “ignore his right to take 30 days to verify his debt and act immediately”)(quoting  
15 Swanson, 869 F.2d at 1226). Moreover, there is nothing inaccurate about  
16 Defendant informing Plaintiff that the administrative wage garnishment would be  
17 immediate if she did not dispute the garnishment or invoke her other rights under  
18 the HEA.

19       Essentially, the court concludes that the opening line of the Notice does not  
20 overshadow Plaintiff’s rights under the HEA. While indicating that Plaintiff’s  
21 employer would be instructed to “immediately withhold money from [her]  
22 earnings,” it clearly states that this withholding would only occur if she did not  
23 “take action set forth in this notice.” The Notice goes on to explain Plaintiff’s HEA  
24 rights in detail. As in Terran, the text of the opening line is uniformly presented in  
25 ordinary, same-size font, with the exception of the lender’s name, United Student  
26 Aid Fund, Inc., which appears in bold font. Under the circumstances, the language  
27 regarding the possibility of immediate withholding of wages does not overshadow  
28 or contradict the Notice’s description of the HEA rights available to Plaintiff.

1 Accordingly, the court finds this particular language standing on its own would not  
2 deceive or mislead the least sophisticated debtor such that it violates the FDCPA.

3 ***B. Indication that Plaintiff “Must” Set Up a Repayment Plan***

4 Plaintiff’s second objection to the Notice pertains to the following language  
5 in the final paragraph on the first page of the Notice, stating: “You must establish a  
6 written repayment agreement with National Enterprise Systems, Inc. on or before  
7 September 29, 2013. Otherwise, United Student Aid Funds, Inc. will proceed to  
8 collect this debt through deductions from your pay.” Am. Compl., Ex. A at 2.  
9 Notwithstanding the explanation of her rights under the HEA on subsequent pages,  
10 Plaintiff contends Defendant’s language advising Plaintiff that the garnishment will  
11 occur unless she enters into a repayment agreement is patently false, deceptive and  
12 misleading, and contrary to the true rights afforded to her by law. Plaintiff alleges  
13 Defendant’s Notice improperly emphasizes that the consumer “must” set up a  
14 repayment plan with Defendant in order to avoid wage garnishment, while glossing  
15 over the consumer’s other equally valid options under the HEA, such as requesting  
16 a hearing or providing notice that the consumer has been recently reemployed.

17 In response to Plaintiff’s allegations, Defendant notes the request for a written  
18 repayment agreement is followed by the enumeration of rights as required by the  
19 HEA. See Renick, 209 F.3d at 1057. As a result, Defendant contends it would be  
20 clear to the least sophisticated debtor that she could take one of several steps to  
21 avoid a wage garnishment, such as requesting a hearing to challenge the wage  
22 garnishment within 30 days or demonstrate reemployment. This is supported by the  
23 fact that five out of the six pages of the Notice are dedicated to requesting a hearing.  
24 Again, Defendant notes the language in question and the language enumerating  
25 Plaintiff’s HEA rights are in the same style and size font, further indicating that the  
26 Notice’s request to establish a written repayment does not overshadow Plaintiff’s  
27 HEA rights. See Terran, 109 F.3d at 1431; Renick, 290 F.3d at 1057.

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1 Defendant further emphasizes that the Notice accurately states that wage  
2 garnishment could be avoided if a repayment agreement is entered into with  
3 Defendant on or before expiration of the 30-day period. Defendant argues that  
4 statement is true as there would be no need for wage garnishment if Plaintiff repaid  
5 her student loans per an agreement with the lender or its agent. Additionally,  
6 Defendant argues the Notice accurately states that wage garnishment “will” occur  
7 “unless” Plaintiff acts by September 29, 2013, by entering into a repayment  
8 agreement or invoking any of Plaintiff’s hearing and dispute rights, which are fully  
9 explained in the balance of the Notice.

10 In her opposition to Defendant’s motion to dismiss, Plaintiff argues it is  
11 misleading to tell a consumer that he or she “must” enter into a payment  
12 arrangement, without simultaneously notifying the consumer of other equally viable  
13 options under the HEA. Plaintiff contends Defendant initially warns the consumer  
14 of the necessity to enter into a repayment agreement, but then fails to treat the other  
15 possible options under the HEA in the same fashion or with the same importance.  
16 Specifically, Plaintiff objects to the Notice having failed to disclose any of the  
17 borrower’s rights on its cover page at all, instead leaving the available HEA rights  
18 “squirreled away on the second page.” Pl. Resp. 10.

19 Plaintiff relies on Robertson v. Richard J. Boudreau & Assocs., LLC as  
20 support for her objection to the Notice based on the list of her rights under the HEA  
21 not being included on the first page of the Notice. 2009 WL 5108479 (N.D. Cal.  
22 Dec. 18, 2009). In Robertson, the collection letter initially warned that “unless  
23 payment in full is made or you arrange through this firm for the repayment of this  
24 debt in a manner acceptable to our client, we will conduct a review of your account.  
25 Our review will determine whether there is a valid legal dispute regarding this debt,  
26 and assuming none, the most effective means to secure repayment.” Id. at \*4. The  
27 court determined that this language implied “to the least sophisticated consumer that  
28 the consumer has only one option, to pay or arrange to pay the debt in full.” Id.

1 The following paragraph set forth the consumer's FDCPA right to dispute; however,  
2 the court found this insufficient as "[s]tating inconsistent information in separate  
3 paragraphs does not provide the level of consumer protection Congress mandated."  
4 Id. Here, Plaintiff contends the "must establish a written payment agreement"  
5 language suggested she had only one option in order to avoid wage garnishment,  
6 and the notification of the right to request a hearing is not disclosed until the second  
7 page when the Notice's cover page commands that a payment arrangement "must"  
8 be made. Like Robertson, Plaintiff argues the language on the cover page is  
9 inconsistent with consumers' other HEA rights, and therefore does not provide the  
10 level of consumer protection Congress mandated.

11 To avoid violating the FDCPA, Plaintiff contends Defendant should have  
12 provided the consumer with a series of mutually exclusive options based upon the  
13 HEA's requirements on the cover page of the Notice. Plaintiff suggests this would  
14 require no more than the inclusion of one sentence notifying the consumer that to  
15 avoid immediate wage garnishment, she must: 1) enter into a payment plan; 2)  
16 request a hearing; or 3) inform Defendant that she had been involuntarily separated  
17 from employment.

18 In its reply brief, Defendant asserts that Plaintiff wrongfully characterizes the  
19 Notice as emphasizing that she "must" establish repayments as the word "must"  
20 received no emphasis, and was in the same-sized font as other language in the  
21 notice. Additionally, Defendant argues the Notice actually emphasized Plaintiff's  
22 HEA rights and the hearing procedure on the second page of the notice using bold  
23 and underlined typeface stating: "**You have the following rights regarding this**  
24 **action: . . .**" Am. Compl., Ex. A at 3. Defendant contends the Notice did  
25 simultaneously (and accurately) explain to Plaintiff that: (1) she must enter into a  
26 repayment agreement to avoid the administrative wage garnishment procedure, and  
27 (2) she has a variety of other options to avoid administrative wage garnishment,  
28 including the option to raise as objections the existence of the debt, the amount of

1 the debt, or that making installment payments in amounts equal to 15% of your  
2 disposable pay, or having payments in that amount withheld from your disposable  
3 pay would constitute an extreme financial hardship.

4 Defendant further objects to Plaintiff's characterization of her HEA rights  
5 being "squirreled away" on the second page of the Notice. Defendant argues  
6 nothing is "squirreled away" on the second page. Rather, the second page of the  
7 notice prominently informed Plaintiff of her rights under the HEA, and how to  
8 request a hearing, in bold and underlined typeface, with the explanation of her rights  
9 set forth in neat, organized bullet points. Defendant notes that the Notice also  
10 informs Plaintiff she can avoid wage garnishment by entering into a repayment plan  
11 on the second page of the Notice, in the second bullet point, alongside the  
12 explanation of Plaintiff's other rights under the HEA. This language receives no  
13 special emphasis, it is argued, and the remaining bullet points on the second page  
14 clearly and accurately explain how Plaintiff may object to wage garnishment in the  
15 absence of a repayment agreement. As a result, Defendant contends the alleged  
16 "command" to make an agreement certainly did not take precedence over all other  
17 options, when the repayment agreement language appeared alongside the  
18 enumeration of various objections Plaintiff may assert if no repayment agreement is  
19 reached.

20 Lastly, Defendant emphasizes that the Notice is six pages in length, with five  
21 of the six pages devoted to explaining Plaintiff's rights under the HEA, including  
22 the three-page form to request a hearing. As a result, Defendant argues Plaintiff  
23 cannot reasonably contend she was misled or that her HEA rights were  
24 overshadowed when five of the six pages of the Notice fully explained her HEA  
25 rights, including how to object to wage garnishment and request a hearing.  
26 Defendant notes the language Plaintiff complains about on the first page of the  
27 Notice received no special emphasis and is consistent with the balance of the  
28 Notice.

1 Having reviewed the entirety of the Notice, the court finds the language on  
2 the cover page does not overshadow or contradict Plaintiff's rights under the HEA  
3 as detailed on the remaining pages of the Notice. While the language itself suggests  
4 Plaintiff must establish repayment to avoid wage garnishment, the Notice clearly  
5 states after that paragraph: "***NOTICE: SEE REVERSE SIDE FOR IMPORTANT***  
6 ***INFORMATION.***" As noted by Defendant, the second page of the Notice states in  
7 bold and underlined font: "**You have the following rights regarding this action:**"  
8 and proceeds to describe Plaintiff's rights under the HEA in an organized and  
9 concise fashion. On the cover page, the Notice indicates that Plaintiff needs to take  
10 action to avoid wage garnishment, and the remaining five pages provide her with  
11 the information she needs to do so. Moreover, the ability to seek a written  
12 repayment agreement is a valid method for Plaintiff to avoid wage garnishment  
13 under the HEA. Finally, although not emphasized by either party, the language  
14 employed throughout the notice is plain and clear, especially when the HEA rights  
15 are articulated. Both the primary notice paragraph and the HEA rights are devoid of  
16 legalese.

17 As for the decision in Robertson, it was not based entirely on the location of  
18 the required disclosure of the borrower's rights compared to the objectionable  
19 statement. The court primarily objected to the language used by the debt collector  
20 because it overshadowed the rights provided in the next paragraph. The court  
21 determined that the language "directly contradicts a debtor's statutory right to  
22 dispute the validity of the debt within thirty days of receipt, and suggests that  
23 defendant alone will determine if there is any valid dispute, without plaintiff's  
24 input." Robertson, 2009 WL 5108479 at \*4. The court found that the debt collector  
25 could not "imply in one paragraph that plaintiff has no right to dispute the debt and  
26 then cure that violation in the next paragraph by stating that plaintiff has such a  
27 right." Id. Here, the objectionable phrase in the Notice informs Plaintiff that she  
28 can avoid wage garnishment by entering into a written payment agreement, one of



1 the rights available to her under the HEA, but it does not directly contradict  
2 Plaintiff's right to object to the wage garnishment or request a hearing.  
3 Accordingly, Robertson is of limited relevance here.

4 Taken in isolation, the court recognizes Plaintiff's concern regarding the  
5 following language: "You must establish a written repayment agreement with  
6 National Enterprise Systems, Inc. on or before September 29, 2013. Otherwise,  
7 United Student Aid Funds, Inc. will proceed to collect this debt through deductions  
8 from your pay." Am. Compl., Ex. A at 2. This is suggestive of a procedural  
9 equation: no repayment agreement equals wage garnishment. Such an  
10 interpretation, standing alone, would be inconsistent with the options set forth on  
11 the following pages of the Notice. However, the question is whether this statement  
12 overshadows the language in the Notice detailing the several options available to  
13 Plaintiff, particularly when the Notice states, in bold, "**NOTICE: SEE REVERSE**  
14 **SIDE FOR IMPORTANT INFORMATION**" immediately following the  
15 objectionable paragraph. This language actually draws the debtor to the thorough  
16 description of her rights on the following page. Given this context, the language  
17 objected to by Plaintiff, while concerning, does not overshadow the information  
18 provided in the remainder of the Notice.

19 Notably, the question is not whether this notice could have been better  
20 constructed or more mitigated in tone, or whether several pages of rights should  
21 have been integrated with the initial demand paragraphs. To be sure, the form and  
22 content of any demand or notice may always be susceptible to improvement. As  
23 stated in Terran, however, "[the court's] role . . . is . . . the essentially negative one  
24 of examining whether a given notice comports with the requirements of the statute."  
25 Terran, 109 F.3d at 1433 (citations and internal quotations omitted).

26 For these reasons, the language indicating Plaintiff must establish a written  
27 repayment agreement in order to avoid wage garnishment does not overshadow or  
28 contradict the Notice's description of the HEA rights available to Plaintiff.



1   ///

2   Therefore, the court concludes this particular language would not deceive or  
3   mislead the least sophisticated debtor such that it violates the FDCPA.

4           ***C. Request for Written Documentation of Employment***

5           In Plaintiff's opposition to Defendant's motion to dismiss, she raises a basis  
6   for her FDCPA claims that was not initially raised in her amended complaint. For  
7   the first time, Plaintiff contends the Notice is misleading because it requires the  
8   consumer to provide written proof of their employment status to satisfy the HEA's  
9   employment exemption when there is no such requirement under the law.<sup>3</sup>

10          Defendant argues Plaintiff's new allegation should not be considered by the  
11   court because it is not pled in her amended complaint. Courts "*may not* look beyond  
12   the complaint to a plaintiff's moving papers, such as a memorandum in opposition  
13   to a defendant's motion to dismiss." See Schneider v. California Dept. of  
14   Corrections, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998) (emphasis in original);  
15   Cordell v. Tilton, 515 F. Supp. 2d 1114, 1128 (S.D. Cal. 2007) (same); Evans v.  
16   County of San Diego, 2008 WL 842459, at \*6 (S.D. Cal. Mar. 27, 2008) (same).  
17   Accordingly, Defendant contends the court should not consider this additional  
18   objection when deciding whether to dismiss the complaint.

19          The court agrees with Defendant's assessment and finds Plaintiff improperly  
20   asserted this objection for the first time in her opposition to Defendant's motion to  
21   dismiss rather than in her amended complaint. As a result, it cannot be used as a  
22   means of surviving Defendant's motion to dismiss for failure to state a claim.  
23   Under the circumstances, the court is reluctant to conclude that Plaintiff cannot

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26           <sup>3</sup> On the second page, the Notice states: "If you wish to claim this exemption  
27   from wage garnishment, you need to complete Part II of the enclosed Request for  
28   Hearing form and send us written proof that you qualify for the exemption by  
September 29, 2013." Am. Compl., Ex. A at 3. Under the HEA, "[t]he guaranty  
agency may not garnish the wages of a borrower whom it knows has been involuntarily  
separated from employment until the borrower has been reemployed continuously for  
at least 12 months." 34 C.F.R. § 682.410(b)(9)(i)(G).

possibly articulate a valid FDCPA claim regarding the written proof of employment requirement. Accordingly, the court grants Plaintiff leave to amend the complaint.<sup>4</sup>

## **II. Violation of RFDCPA in Count III**


Defendant seeks dismissal of Plaintiff's RFDCPA claim for many of the same reasons discussed above with regard to the FDCPA. In addition, Defendant contends Plaintiff's claim under the RFDCPA is expressly preempted by the HEA. In her opposition to Defendant's motion to dismiss, Plaintiff withdraws her RFDCPA claim alleged in Count III. Accordingly, Plaintiff's RFDCPA claim in Count III is dismissed.

## **CONCLUSION**

For the foregoing reasons, the court grants Defendant's motion to dismiss. Because Plaintiff's present claims do not appear curable by further amending her complaint as they are cabined by the undisputed language of the Notice, the claims in Counts I, II, and III of the first amended complaint are dismissed without leave to amend. Plaintiff does, however, have leave to amend the complaint with regard to the Notice's written proof of employment requirement and must do so within twenty days of the filing of this order.

IT IS SO ORDERED.

DATED: March 21, 2014

  
Hon. Jeffrey T. Miller  
United States District Judge

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<sup>4</sup> Should Plaintiff consider amending her complaint to include this claim, she may wish to bear in mind the implications of the Seventh Circuit's decision in Kort v. Diversified Collection Serv., 394 F.3d 530 (7th Cir. 2005) as raised by Defendant in its reply brief.